Ng Chian Perng (sued by her mother and next friend Wong Nyet Yoon) v Ng Ho Peng

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1-11-191 OF 1993
ABDUL KADIR SULAIMAN J
24 MARCH 1998

Family Law *— Children — Legitimacy — Proof of — Allegation that respondent was father of child conceived while applicant was married to another man — Whether respondent ought to be subjected to a DNA test — Whether court ought to draw adverse inference against applicant for failure to call husband as a witness — Whether court ought to observe and compare similarity in the appearance of the respondent and the child to establish that the respondent was the father*

Family Law *— Children — Maintenance — Legitimacy — Allegation that respondent was father of child conceived while applicant was married to another man — Whether there was a presumption of legitimacy under s 112 of the Evidence Act 1950 — Whether presumption was rebutted — Whether child is deemed to be the legitimate child of the applicant and the husband — Married Women and Children (Maintenance) Act 1950 s 3(2) — Evidence Act 1950 s 112*

The appellant claimed on behalf of her infant daughter ('the child') for maintenance against the respondent under s 3(2) of the Married Women and Children (Maintenance) Act 1950. According to the appellant, as a result of her intimate relationship with the respondent, she conceived and gave birth to the child and the birth was duly registered with the respondent duly named as the father. The respondent denied the allegation, and submitted that at all material times the appellant was a legally married woman and was still married to one Phang Mow Yew ('the husband'). He further deposed that the child was deemed to be the legitimate child of the appellant and the husband, and that his name was used as the father of the child in her birth certificate without his consent or knowledge. At the trial, counsel for the appellant requested for the respondent to subject himself to a DNA test which the respondent refused. Counsel also urged the court to observe and compare the similarity in the appearance of the respondent and the child to establish that the respondent was the father. The learned magistrate denied both requests. She drew an adverse inference against the appellant for not calling the husband as a witness and held that, as the appellant was a married woman, the presumption of legitimacy arose under s 112 of the Evidence Act 1950 ('the Act'), and dismissed the claim. As to costs, the learned magistrate ordered at the trial that each party was to bear its own costs, but in the judgment she ordered the dismissal of the complaint with costs. The appellant appealed.

Held, dismissing the appeal:

(1) The learned magistrate was right in not addressing the issue of the refusal of the respondent to subject himself to the DNA test. The onus was on the appellant to prove that the subject child was illegitimate and that the respondent was the father. This the appellant had failed to prove. Under s 112 of the Act, there was a presumption that the child was the legitimate child of the husband for the reason that at the material time of the birth, there subsisted a valid marriage between the appellant and the husband. To rebut the presumption, the appellant must show that she and the husband had no access to each other at any time when the child could have been begotten (see p 692F–H).

(2) The learned magistrate was correct in drawing an adverse inference against the appellant for not calling the husband as a witness. The evidence of the husband was indeed very crucial in determining the issue concerning the status of the child. The husband may be able to provide credible evidence that he and the appellant had no access to each other at any time when the subject child could have been begotten, so that the presumption under s 112 of the Act may be properly rebutted.

Although counsel had submitted that attempts had been made to secure his presence but without success, there was no evidence of the filing of an affidavit of non-service except for the word of counsel from the Bar that the subpoena had not been served on the husband. Under the circumstances, it was very proper for the learned magistrate to invoke the operation of s 114(g) of the Act against the appellant (see p 693B–E).

(3) Resemblance of features as evidence of paternity has been a matter of some controversy. The evidence is of little value, very unsafe and conjectural (see p 693G–H).

(4) The learned magistrate was not allowed to differ in her grounds of decision from the earlier decision made by her at the conclusion of the trial. However, costs is a matter of discretion for the court to award. In the court below, the parties did not make any submission on this subject of costs. In the circumstances, for the exercise of a proper discretion, costs should follow the event; therefore, costs were ordered against the appellant in the court below and here (see pp 693I and 694B–C).

[Bahasa Malaysia summary

Perayu membuat tuntutan bagi pihak anak perempuannya ('si anak') untuk nafkah terhadap penentang di bawah s 3(2) Akta Perempuan Bersuami dan Anak-Anak (Nafkah) 1950. Menurut perayu, akibat hubungannya yang mesra dengan penentang, dia telah mengandung dan melahirkan si anak dan kelahiran itu didaftarkan sewajarnya dan penentang dinamakan sebagai bapanya. Penentang menafikan

pengataan itu, dan menghujahkan bahawa pada semua masa material perayu adalah perempuan yang bersuami dan masih berkahwin kepada seorang bernama Phang Mow Yew ('si suami'). Dia selanjutnya mendepos bahawa si anak telah dianggap anak yang sah kepada perayu dan si suami, dan bahawa namanya digunakan sebagai bapa si anak dalam sijil kelahirannya tanpa kebenaran atau pengetahuannya. Di perbicaraan, peguam perayu meminta supaya penentang menjalani ujian DNA yang mana ini ditolak oleh penentang. Peguam juga menggesa mahkamah supaya memerhati dan membandingkan keserupaan dalam rupa dan perawakan penentang dan si anak untuk membuktikan bahawa penentang adalah bapanya. Majistret telah menolak kedua-dua permintaan. Beliau telah membuat inferens bertentangan terhadap perayu kerana tidak memanggil si suami sebagai seorang saksi dan memutuskan bahawa, oleh kerana perayu adalah perempuan bersuami, anggapan kesahtarafan berbangkit di bawah s 112 Akta Keterangan 1950 ('Akta tersebut'), dan menolak tuntutan. Mengenai kos, majistret yang arif memerintahkan di perbicaraan bahawa setiap pihak menanggung kos sendiri, tetapi dalam penghakiman beliau memerintahkan penolakan aduan dengan kos. Perayu membuat rayuan.

Diputuskan, menolak rayuan:

(1) Majistret yang arif adalah betul dalam tidak menumpukan perhatian kepada isu keengganan penentang untuk menjalani ujian DNA. Beban terletak pada perayu untuk membuktikan bahawa anak adalah tak sah dan bahawa penentang adalah bapanya. Ini gagal dibuktikan oleh perayu. Di bawah s 112 Akta tersebut, terdapat satu anggapan bahawa si anak adalah anak sah si suami atas sebab bahawa pada masa material kelahiran, wujudnya perkahwinan yang sah di antara perayu dan si suami. Bagi mematah anggapan itu, perayu mesti menunjukkan bahawa ia dan suaminya tidak mempunyai akses antara satu sama lain pada bila-bila masa si anak boleh dikandung (lihat ms 692F–H).

(2) Majistret yang arif adalah betul dalam membuat inferens yang bertentangan terhadap perayu kerana tidak memanggil si suami sebagai seorang saksi. Keterangan si suami sesungguhnya amat penting dalam menentukan isu berkenaan dengan taraf si anak. Si suami mungkin boleh menyediakan keterangan yang boleh dipercayai bahawa perayu dan dirinya tidak mempunyai akses antara satu sama lain pada bila-bila masa si anak boleh dikandung, agar anggapan di bawah s 112 Akta tersebut boleh dipatahkan dengan wajarnya.

Walaupun peguam berhujah bahawa percubaan telah dibuat bagi menjamin kehadirannya tetapi tidak berjaya, tiada terdapat keterangan mengenai pemfailan afidavit ketaksampaian melainkan mengikut kata peguam bahawa sepina telah tidak disampaikan kepada si suami. Di bawah keadaan-keadaan ini, adalah amat

wajar untuk majistret yang arif menggunakan s 114(g) Akta tersebut terhadap perayu (lihat ms 693B–E).

(3) Keserupaan dalam raut muka sebagai bukti paterniti telah menjadi hal yang berupa kontroversi. Keterangan ini tidak berapa bernilai, tidak tentu dan merupakan tekaan (lihat ms 693G–H).

(4) Majistret yang arif tidak dibenarkan menyimpang daripada keputusan lebih awal yang dicapai apabila tamatnya perbicaraan dalam alasan penghakimannya. Namun demikian, kos merupakan suatu perkara untuk diawardkan berdasarkan budi bicara mahkamah. Di mahkamah bawah, pihak-pihak tidak membuat sebarang penghujahan atas perkara kos. Dalam keadaan ini, untuk pelaksanaan budi bicara yang wajar, kos patut memperikut keadaan; maka, kos diperintahkan terhadap perayu di mahkamah bawah dan di sini (lihat ms 693I dan 694B–C).]

Notes

For a case on legitimacy, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1843.

For cases on maintenance, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1844–1846.

Case referred to

Russel v Russel & Mever 39 TLR 287 (refd)

Legislation referred to

Evidence Act 1950 ss 102, 112, 114(g)
Married Women and Children (Maintenance) Act 1950 s 3(2)

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Balwant Singh Sidhu (*Balwant Singh Sidhu & Co*) for the respondent.

Cur Adv Vult

Abdul Kadir Sulaiman J: This is an appeal by the applicant against the decision of the learned magistrate dismissing her claim on behalf of the infant daughter for maintenance against the respondent made under s 3(2) of the Married Women and Children (Maintenance) Act 1950 ('the 1950 Act'). Her claim is contained in her affidavit affirmed on 3 April 1987. Section 3(2) of the Act states:

> If any person neglects or refuses to maintain an illegitimate child of his which is unable to maintain itself, a court, upon due proof thereof, may order such person to make such monthly allowance as to the court seems reasonable.

Under the said subsection, the onus is on the appellant to satisfy the court that the respondent is the father of the illegitimate child and not for the respondent to prove that he is not the father. See s 102 of the Evidence Act 1950. According to the affidavit of Wong Nyet Yoon, the mother, as a result of her intimate relationship with the respondent, she conceived a child in May 1985 and on 7 February 1986 she gave birth to the child and the said birth was duly registered with the respondent duly named as the father. The respondent has not maintained the child in any way at all since her birth leaving the sole responsibility to the mother. Hence, the claim for maintenance of RM600 per month from the respondent.

Upon the filing of the said complaint, the magistrate on 9 April 1987 issued a notice to the respondent to appear in person or by advocate and solicitor before the court to show cause why an order pursuant to the said section of the 1950 Act should not be made against him. In response, the respondent filed in all three affidavits opposing the complaint. The respondent denied the allegation of intimacy between him and the appellant and the fact of having any sexual relationship with the appellant. He verily believed that at all material times the appellant was a legally married woman being married sometime in 1975 and is still married to one Phang Mow Yew ('the husband') and that there is one child of the family, Phang Chen Yee, born on 20 October 1976. He further deposed that the child born to the appellant on 7 February 1986 ('the subject child') is deemed to be the legitimate child of the appellant and the husband and that his name was used as the father of the child in her birth certificate without his consent or knowledge.

After several adjournments, the hearing before the learned magistrate commenced on 22 November 1990. The appellant gave evidence before the learned magistrate. In her evidence, she admitted that she was married to Phang Mow Yew in 1975. As their relationship was not cordial, they lived apart sometime in the middle of 1982. On 24 December 1982, they entered into a separation agreement exhibited as 'P–3'. The agreement, inter alia, provides the custody of child born to them, Phang Chen Yee, shall be with the appellant but the husband shall have access to the child once a month after due prior notice to the appellant. It is also provided that the husband shall pay to the appellant a monthly sum of RM500 on the first day of each month for the education of the child and maintenance effective from December 1982. They also agree to file a joint petition for dissolution of their marriage by mutual consent. There is no evidence before the magistrate that their marriage has been dissolved. But she believed that she had been divorced because on her part she had signed a joint petition for divorce though her lawyer told her that the husband refused to sign the same. She knew that she had not been divorced when she filed this complaint for maintenance on behalf of the subject child, Ng Chian Perng. Therefore, for all intend and purpose they are still husband and wife. After the separation, the appellant went to stay with her parent. In cross examination, the appellant testified that the husband provided her monthly maintenance of RM1,500 to M2,000 until August 1990. The

appellant in her evidence testified that when the subject child was born, she reported the name of the respondent as the father of the child. She admitted that at the time, the respondent was not present with her.

In the trial, the appellant's father as PW2 also gave evidence. In his evidence, he testified that at the end of 1984 the appellant moved into his house until she obtained a job in China Press. According to the evidence of the appellant, she worked with China Press in the middle of 1984. Continuing with his evidence, PW2 testified further that since the time the appellant moved to stay with him, the husband never visited her. When asked about the payment of maintenance to the first child by the husband of the appellant, his reply was that the husband instructed over the telephone from time to time for the child to meet the husband at certain places for that purpose and the child went on his own to collect the maintenance money. When asked for the age of the child at the time, his reply was that he did not know the age because he was not paying attention to his age. He blamed his ill health for that. He was in and out of hospital for his illness. Be it noted that according to the evidence, the child of the appellant and the husband was born on 20 October 1976 and therefore in 1984 he was around 8 years of age, and according to the separation agreement, the child was to be in the custody of the appellant with access to the husband only once a month after due prior notice to the appellant. It is also in the evidence of PW2 that he did not know of the condition of the appellant until she was pregnant and that she always went out in the evenings with the respondent and came back late at night.

Having completed with the evidence of the appellant and PW2, the trial was again adjourned from time to time as the court was told that the appellant's subpoena on the husband remained unserved. Ultimately, on 21 January 1993, the counsel for the appellant informed the court that the subpoena on the husband remained unserved. The court granted a final adjournment to 17 April 1993 to get the husband witness. On 17 April 1993, the matter was adjourned to 24 May 1993 because counsel for the appellant was engaged before the magistrate's court in Johor Bahru. On 24 May 1993, the case was adjourned again to 13 July 1993 as the appellant's counsel was engaged in Parliament. On that day, the court directed that the adjournment on 13 July 1993 was final for purpose of oral submissions. Otherwise, the parties are to provide written submissions. On 13 July 1993, the court was informed that the appellant has no other witnesses to offer. The respondent then made a submission of no case to answer and therefore, would not be calling any witness. The parties then proceeded with their submissions on the case. At the end of it, the court adjourned the matter to 9 August 1993 for the decision. On 9 August 1993, the learned magistrate dismissed the complaint of the appellant with each party to bear its own costs.

By her grounds of decision of 2 April 1994, the learned magistrate stated that, as the appellant was a married woman, the presumption of legitimacy arises under s 112 of the Evidence Act 1950. At p 19 of the appeal record, the learned magistrate said:

Walaupun pemohon dalam kes memberi keterangan bahawa beliau telah berpisah dengan suaminya, terdapat keterangan bahawa suami beliau mempunyai 'access' kepada anak-anak dan hendaklah terus membayar nafkah kepada mereka.

Walaupun pemohon dan suami tidak tinggal bersama tetapi suami pemohon mempunyai peluang untuk 'bersama' pemohon.

Then, the learned magistrate continued:

Suami pemohon telah tidak dipanggil sebagai saksi. Walaupun peguam pemohon mengatakan cubaan menyerah sapina gagal ke atas suami pemohon, namun tiada keterangan dari penghantar sapina untuk mengesahkan cubaan itu. Memandangkan suami pemohon adalah seorang saksi penting, anggapan s 114(g) Akta Keterangan 1950 adalah terpakai.

Fakta bahawa nama responden telah dipakai di dalam sijil kelahiran Ng Chian Perng bukanlah bukti mutlak bahawa penentang adalah bapa kandungnya. Penentang sendiri menafikan bertanggungjawab terhadap NCP.

Di akhir kes pemohon, peguam penentang 'made a submission of no case to answer' dan merujuk kepada *Marimuthu v Thiruchitamhala M* [1966] MLJ 203.

Saya bersetuju dengan hujah bahawa anggapan ketidaksahan di bawah s 112 Akta Keterangan 1950 telah tidak ditolak dengan keterangan yang jelas dan memutuskan.

Saya dengan ini menolak permohonan pemohon dengan kos.

Before me, learned counsel for the appellant submitted that the learned magistrate has misdirected herself by way of non-direction in not addressing this issue of the refusal of the respondent to subject himself to the DNA test. Indeed before the learned magistrate, learned counsel for the appellant requested the respondent to go for a DNA test but he disagreed. Thus, learned counsel submitted that the respondent chose to seek solace in a plea of no case to answer instead. In my view, the learned magistrate was right in not addressing this issue of the refusal of the respondent to subject himself to the DNA test. The onus is on the appellant to prove that the subject child is illegitimate and that the respondent is the father. This, in my view, the appellant had failed to prove. Under s 112 of the Evidence Act 1950, there is a strong presumption that the subject child is the legitimate child of the husband of the appellant for the reason that at the material time of the birth, there subsisted a valid marriage between the appellant and the husband. To rebut the presumption, the appellant must show that she and the husband has no access to each other at any time when the child could have been begotten. Of course, in her own evidence, the appellant denied this access but from the surrounding circumstances led in the evidence, the possibility of this access cannot be ruled out. By their separation agreement, the husband was not totally driven out of the appellant to leave them with no access to each other. The husband was given the right of access to the child with her prior approval. The husband was required to provide maintenance to their first child by making payment to the appellant. The evidence of PW2 that payment was made at prearranged venues with the first child himself meeting the husband is not at all convincing taking into account the age of the child and the term of

A the separation agreement as to the manner of payment and the accessibility of the child to the husband. Further, it is the conduct of the appellant herself who were always out in the evenings and coming back late at nights. Anything can happen outside the view of PW2, the father. The fact that the appellant may have sexual intercourse with some other persons including the respondent during the subsistence of the valid marriage with the husband does not rebut the presumption that the child remains the legitimate child of the husband. This leads me to the rejection of the submission by learned counsel for the appellant that the learned magistrate was wrong in drawing an adverse inference against the appellant for not calling the husband as a witness. The evidence of the husband is indeed very crucial in determining the issue concerning the status of the child. The husband may be able to provide credible evidence that he and the appellant had no access to each other at any time when the subject child could have been begotten, so that the presumption under s 112 of the Evidence Act 1950 may be properly rebutted. Learned counsel submitted that attempts had been made to secure his presence but without success. From the record of the proceedings, various postponements were granted by the learned magistrate simply to give the opportunity to the appellant to bring in the husband witness. But in the end, the court was told that the subpoena in respect of him had not yet been served on him. There is no evidence of the filing of an affidavit of non-service except for the word of counsel from the Bar that the subpoena had not been served on the husband. Under the circumstances, it is very proper for the learned magistrate to invoke the operation of s 114(g) of the Evidence Act 1950 against the appellant.

During the submission at the trial, there was a request made by learned counsel for the appellant for the court to observe and compare the similarity in the appearance of the respondent and the subject child to establish that the respondent is the father. The learned magistrate had rightly rejected the said request as according to her it would not be conclusive to prove that the subject child is the daughter of the respondent. Considering the various authorities cited in *Sarkar's Law of Evidence*, on the issue of paternity, I would agree with the finding of the learned magistrate. According to the learned author, resemblance of features as evidence of paternity, in cases of bastardy, inheritance or seduction, has been a matter of some controversy. The evidence is of little value, very unsafe and conjectural: *Russel v Russel & Mever* 39 TLR 287.

In the circumstances, I see no merit in this appeal. On the evidence, the appellant has failed to prove as required by s 3(2) of the 1950 Act and has failed to rebut the presumption under s 112 of the Evidence Act 1950 to make the respondent liable for the claim. In the circumstances, I would dismiss this appeal. As to costs, it is a ground of appeal by the appellant that the learned magistrate was wrong when she ordered at the trial that each party bear its own costs, whilst in the judgment she ordered the dismissal of the complaint with costs. I agree that the learned magistrate is not allowed to differ in her grounds of decision from the earlier decision made by her at the conclusion of the trial. According to the record, on

9 August 1993 when she delivered her oral decision dismissing the complaint of the appellant, she made an order that each party bears its own costs. However, in her grounds of judgment of 2 April 1994, she stated that she dismissed the complaint with costs which necessarily means that the appellant would bear the costs wholly. However, costs is a matter of discretion for the court to award. In the court below, the parties did not make any submission on this subject of costs. Before me in this appeal also, learned counsel for the appellant does not say anything about costs except to point out the error made by the learned magistrate as stated above. In the circumstances, for the exercise of a proper discretion, I would say that costs should follow the event. As the result of the appeal in this case is the dismissal of same, I would order that costs be ordered against the appellant in the court below and here. I order accordingly.

Appeal dismissed with costs here and below. The decision of the learned magistrate is affirmed subject to the costs to be borne by the appellant.

Appeal dismissed.

Reported by Loo Lai Mee